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THE NEGOTIABLE INSTRUMENTS LAW.

HOWEVER much lawyers may differ as to the expediency of the attempt to secure by codification uniformity in American commercial law, all will agree that the commissioners for promoting uniformity of legislation in the United States could not have selected a better subject for the beginning of the experiment than that of negotiable paper. Even the opponents of codification must admit that the Negotiable Instruments Law, framed and recommended by the commissioners in 1896, and already enacted in fifteen states,[1] contains a number of desirable changes in the law of Bills and Notes, and will, when generally adopted, settle definitively several questions which have given rise to much litigation and conflict of decisions. On the other hand, the friends of codification who chance to read the following pages may become convinced that there are serious defects of commission and omission in the new code. Codification is with us a new art, and it is not surprising, although it is unfortunate, that the commissioners did not realize, as continental codifiers realize, the extreme importance of the widest possible publication of the proposed code, and the necessity of abundant criticism, especially of public criticism, from practising lawyers and judges, professors and writers,

[1] Colorado, Connecticut, Florida, Maryland, Massachusetts, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Virginia, Washington, Wisconsin, and also the District of Columbia.

merchants and bankers. It is far from an agreeable task to offer criticisms at this late hour.[1] Nor would the following criticisms be offered now but for the writer's conviction that the Negotiable Instruments Law ought not to be enacted by any state which has not yet acted in the matter, unless changed in important respects, and that those states in which it has been adopted should remedy its defects by supplemental legislation.[2] The plan of making the law of Bills and Notes uniform throughout the United States has found favor in so many states that the enterprise ought to be carried through on the basis of the commissioners' proposed code. But in the interest of future codification, as well as for the sake of the law itself, this new legislation should be in such form as to stand the fire of adverse, if also fair-minded, critics.

Before considering the defects in the new code attention should be called to its merits. These are of two kinds: first, salutary changes in the law; and, secondly, the settlement of controverted questions.

Under the new law a negotiable instrument may be made payable to one or more of several payees,[3] or to the holder of an office for the time being.[4] These provisions give effect to the tenor of the instrument and nullify certain unfortunate decisions to the contrary in which the judges failed to grasp the mercantile conception of such instruments.[5] Another judicial error is corrected by the provision that an instrument, though indorsed in blank, ceases to be negotiable by delivery whenever the last indorsement thereon is a special indorsement.[6] Section 166 enacts that the maturity of an acceptance for honor of a bill payable after sight shall be calculated from the date of the noting for non-acceptance, and not, as was erroneously decided in Williams *v.* Germaine,[7] from the date of the acceptance for honor. Since an

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[1] The writer, although interested in the subject of Bills and Notes both as an author and a teacher, saw the Negotiable Instruments Law for the first time after its enactment by four state legislatures.

[2] For several of the criticisms here suggested the writer gratefully acknowledges his indebtedness to his colleagues, Professor Williston and Professor Brannan, who successively have had charge of the subject of Bills and Notes in the Harvard Law School during the last ten years, and he takes satisfaction in adding that these experts in the law of Negotiable Paper concur with the views expressed in this paper.

[3] N. I. L. sect. 8-5. The references follow the numbering of the commissioners' draft.

[4] N. I. L. sect. 8-6.

[5] Blanckenhagen *v.* Blundell, 2 B. & Al. 417; Cowie *v.* Stirling, 6 E. & B. 333.

[6] N. I. L. sect. 9-5, nullifying the doctrine first advanced by Lord Kenyon in Smith *v.* Clarke, Peake, 225; 1 Esp. 180, s. c. The language of sect. 9-5 is not happily chosen for the reasons pointed out, *infra*, p. 246.

[7] 7 B. & C. 468.

acceptor, by section 62, engages to pay the bill "according to the tenor of his acceptance," he must pay to the innocent payee or subsequent holder the amount called for by the bill at the time he accepted, even though larger than the original amount ordered by the drawer. A bank certifying a raised check is in the same case, since section 187 assimilates a certification to an acceptance. If the acceptor or certifying bank must honor his acceptance or certification in such a case, *a fortiori* a drawee who pays a raised bill or check, without acceptance or certification, should not recover the money paid from an innocent holder. These results are at variance with numerous American decisions, but they are changes for the better, and, so far as adopted, bring the law of this country into harmony with the law of nearly, if not indeed all, of the European states.[1]

Other judicious changes for the better, but not involving the correction of judicial mistakes, are the following: The abolition of days of grace;[2] the assimilation of sight and demand paper;[3] the provisions that the negotiability of the instrument shall not be affected by its bearing a seal;[4] that a payor may disregard a condition in an indorsement;[5] and that the holder in due course may enforce payment of an altered instrument according to its original tenor.[6]

Especially to be commended are those sections of the new code which settle, and in the right way, certain questions which have been a prolific source of litigation and antagonistic decisions. Nothing but good can come from enacting that the negotiability of an instrument is not destroyed by a clause providing for the payment of exchange,[7] or the costs of collection, or an attorney's fee in case of default,[8] or by a clause giving a power to confess judgment.[9] The same is true of the provisions that an antecedent debt constitutes value;[10] that the holder in due course, although he paid less, may enforce payment of the face value from all parties to the instrument;[11] and that a check is not an assignment of the drawer's claim upon the bank.[12] The rules regulating the liability of the anomalous indorser[13] are admirable, but for one slight omission which may be easily remedied, as will be shown on a subsequent page.[14] The doctrine of SECTION 16, that one who has signed

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[1] 4 HARVARD LAW REVIEW, 306, 307.
[2] N. I. L. sect. 85.
[3] N. I. L. sect. 7–1.
[4] N. I. L. sect. 6–4.
[5] N. I. L. sect. 39.
[6] N. I. L. sect. 124.
[7] N. I. L. sect. 2–4.
[8] N. I. L. sect. 2–5.
[9] N. I. L. sect. 5–2.
[10] N. I. L. sect. 25.
[11] N. I. L. sect. 57.
[12] N. I. L. sect. 189.
[13] N. I. L. sect. 64.
[14] *Infra*, p. 250.

a negotiable instrument complete on its face is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or stolen from him, or even from some one else after his death, is somewhat startling at first. But it should commend itself on reflection. It has been adopted, after much consideration, in Germany.

The new code, it is believed, would have gained greatly in simplicity, arrangement, and expression, if its framers had grasped firmly the principle that the formal right of a claimant upon a bill or note depends solely upon whether he is the holder by the tenor of the instrument, and had also given due emphasis to the distinction between real and personal or equitable defences. It is, however, too late to recast the code. The critic must content himself with pointing out formal or substantial defects in particular sections.

If it be said that it is not worth while to make merely formal changes in sections that have been already enacted in sixteen jurisdictions, it may be answered that clearness, conciseness, and the right way of putting things are intrinsically desirable, and that improvements of this kind do not involve any sacrifice, as to the substantive law, of the principle of uniformity.

It is from this point of view that the following suggestions are made as to matters of form.

SECTION 3–2 provides that an order or promise is not rendered conditional by the addition of "A statement of the transaction which gives rise to the instrument." What do these words mean? Do they cover the case of a note coupled with the words, "Given as collateral security for A's debt to the payee?" Such an interpretation, although a literal one, would be deplorable, and would nullify several decisions.[1] Mr. Crawford, the draftsman of the code, suggests that this sub-section applies to the case of notes containing a statement that it is given for a chattel which is to be the property of the owner of the note until the note is paid.[2] Such a note is deemed negotiable in several states,[3] and justly, being in effect nothing more than a note secured by a chattel mortgage.

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[1] Robbins *v.* May, 11 A. & E. 213; Haskell *v.* Lambert, 16 Gray, 592; Costelo *v.* Crowell, 127 Mass. 293; 134 Mass. 280, 285; American Bank *v.* Sprague, 14 R. I. 410; Hall *v.* Merrick, 40 Up. Can. Q. B. 566.

[2] Crawford, An. N. I. L. 12.

[3] Chicago Co. *v.* Merch. Bank, 136 U. S. 268; Howard *v.* Simpkins, 69 Ga. 773; Choate *v.* Stevens, 116 Mich. 28; Heard *v.* Dubuque Bank, 8 Neb. 10; Mott *v.* Havana Bank, 22 Hun, 354; Kimball *v.* Mellon, 80 Wis. 133.

But it is highly improbable that the courts of Massachusetts, Kansas, and Minnesota, which have taken the opposite view,[1] will treat this sub-section as changing the law of those states. One New York judge has already ruled that the Negotiable Instruments Law has no application to such a note.[2] Many cases have decided that the statement of a consideration in a note is not notice to a transferee of its failure.[3] But the doctrine of these cases, which are doubtless the only ones which this sub-section can fairly be made to cover, is a rule as to *bona fides*, and has nothing to do with conditions. The sub-section in question should be stricken from the act. If interpreted literally, it is mischievous. If not taken literally, it is obscure, inartistic, and useless.

SECTION 36–2 and 3. An indorsement is restrictive which either (1) "constitutes the indorsee the agent of the indorser, or (2) vests the title in the indorsee in trust for or to the use of some other person." Since the so-called "agent of the indorser" has, under section 37, the right to sue in his own name on the instrument, but for the benefit of the indorser, he is in truth a trustee, and not a mere agent. The sub-sections 2 and 3 should therefore be consolidated as follows: "An indorsement is restrictive which vests the title in the indorsee in trust for the indorser or some third person."

SECTION 137 is to the effect that a drawee who destroys a bill delivered to him for acceptance, or refuses to return it within the usual time, shall be deemed to have accepted it. A refusal to accept is an acceptance! Such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well-nigh inexplicable. As a consequence of this fantastic provision the holder may bring concurrent actions: against the drawee because of his fictitious acceptance, and against the drawer because of the drawee's non-acceptance. Nor is anything gained by this fiction, of which there is no trace in the English act. All the demands of justice are met by holding the misconducting drawee liable for a conversion of the bill.[4] The section should be cancelled as worse than useless.

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[1] Sloan *v.* McCarty, 134 Mass. 245; South Bend Co. *v.* Paddock, 37 Kan. 510; Deering *v.* Thorn, 29 Minn. 120.

[2] Third Bank *v.* Spring, 28 N. Y. Misc. Rep. 9.

[3] 1 Ames, Cases on Bills and Notes, 775, n. 1.

[4] Under the New York statute, 2 Rev. Stat. (6th ed.) 1161, from which section 137 is copied, the holder, to recover, must prove a conversion of the bill. Matteson *v.* Moulton, 79 N. Y. 627.

The following sections of the code seem to the writer to be defective, not merely in point of form, but in substance.

SECTION 9–3 declares an instrument to be payable to bearer, although it is "payable to the order of a fictitious or non-existing person." Such a rule ignores the tenor of the instrument; nor is there any judicial precedent or mercantile custom in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation. By the combined effect of this section and section 16, if a note payable to a fictitious payee were stolen from the maker, and indorsed by the thief in the name of the payee, the maker would be liable upon the note to any holder in due course. For, the note being already payable to bearer, the forged indorsement in the payee's name would be of no legal significance. Such a result would be a cruel injustice to the maker. The section should be materially changed. The real and commendable object of the section would be attained, without resorting to a fiction, by a provision as follows: "If a bill be drawn, or a note made, payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person not intended to have any interest in the instrument, and if such bill or note be indorsed by the drawer or maker in the name of the nominal payee, the instrument will have the same effect as a bill or note payable to the order of, and indorsed by, the drawer or maker respectively."

SECTION 9–(5) provides that an instrument is payable to bearer "(1) where it is expressed to be so payable" and "(5) where the only or last indorsement is an indorsement in blank." The language of this sub-section (5), which is borrowed from section 8–(3) of the English act, is not well chosen. If it is to be taken as it stands, a note payable by A to the order of B and bearing the anomalous blank indorsement of C would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank. This objection apart, the sub-section means that, if an instrument is expressly payable to bearer, it continues to be so payable, although it afterwards be indorsed specially; but that, if an instrument payable to the order of a particular person has become payable to bearer by being indorsed in blank, it ceases to be payable to bearer, if afterwards indorsed specially. This distinction between instruments originally payable to bearer and instruments made so pay-

able by indorsement in blank is illogical and undesirable, and probably was not contemplated by the framers of the English and American acts. There is still a third objection to this sub-section. If an instrument indorsed in blank and subsequently indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this sub-section, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name. The following substitute is suggested for section 9–(1) and 9–(5): "The instrument is payable to bearer

"(1) when it is expressed to be so payable;

"(5) when, although originally payable to order, it is indorsed in blank by the payee or a subsequent indorsee.

"An instrument payable to bearer will, however, whenever it is indorsed specially, carry notice that the property in it was at one time vested in the special indorsee, so that, in the absence of an indorsement or assignment by him, all subsequent holders will hold for the benefit of such indorsee."

SECTION 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument, if not duly authorized.[1] This is a departure from the English act and from the almost uniform current of judicial decisions.[2] This new rule involves a flat contradiction of the instrument, and the fiction works not justice but injustice. For example: A, mistakenly believing that he is duly authorized, signs a note, "A, agent for B," and delivers it to C, the payee. At maturity B repudiates the note. He is, however, at that time a bankrupt. A is rightfully chargeable to C on his implied warranty of authority, but only to the amount that C might have recovered from B, if he had authorized the note. But, under section 20, A is liable to C for the face of the note.

By SECTION 22 the indorsement or assignment of the instrument by an infant "passes the property therein." Does this section,

[1] Mr. Crawford so interprets the section. Crawford, An. N. I. L. 26.

[2] Hall *v.* Crandall, 29 Cal. 567; Noyes *v.* Loring, 55 Me. 408; Bartlett *v.* Tucker, 104 Mass. 336; White *v.* Madison, 26 N. Y. 117; Miller *v.* Reynolds, 92 Hun, 400. The case of Byars *v.* Doores, 20 Mo. 284, is *contra.*

like the corresponding section of the English act, mean merely that the indorsee has the right to enforce payment from all parties prior to the infant, or does it mean that the indorsee becomes absolute owner of the instrument, so that he and his transferees, whether with or without notice of the infancy, may retain the instrument even against the infant? If it was intended to reproduce the effect of the English act on this point, it is unfortunate that the unambiguous language of that act was not retained. If, on the other hand, it was intended to make the infant's transfer of negotiable paper irrevocable, the section introduces a radical change in the law as to the rights of infants, and one that goes unnecessarily far in protecting an indorsee who knows that he is dealing with an infant.

SECTION 29 defines an accommodation party as one who has signed the instrument "without receiving value therefor and for the purpose of lending his name to some other person." By this definition one who has received a commission, which is certainly value, for lending the credit of his name would not be an accommodation party. But no business man or good lawyer would sanction such a distinction. The words, "without receiving value therefor and," should be cancelled as inaccurate and misleading.

SECTION 34 distinguishes between special and blank indorsements, but it is nowhere stated that an indorsement, like the drawing of a bill, is an order. If the payee writes, "I assign this note to B," or "I guarantee to B the payment of this note," is he liable as indorser on his assignment or guaranty? Is his transferee an indorsee, and therefore within the rule that gives a holder in due course the title free from equitable defenses? There are numerous but discordant decisions on these points, and it is unfortunate that the new code does not secure uniformity here, as it does in the matter of notes payable with exchange or attorneys' fees.

SECTION 37 confers upon the indorsee under a restrictive indorsement the right to bring any action that the indorser can bring. Inferentially such an indorsee cannot sue his indorser. This is just, if the instrument was transferred to the indorsee for the benefit of the indorser. But unjust, if the indorsement was for value to the indorsee in trust for a third person.

SECTION 40, which has no counterpart in the English act, provides that an instrument indorsed in blank, although subsequently indorsed specially, "may nevertheless be further negotiated by delivery," the special indorser being liable of course "to only such holders as make title through his indorsement." If, for example,

the special indorsee lost possession of the instrument by accident or theft, and the finder or thief transferred it by delivery to one who had no notice of the loss or theft, the latter is entitled to charge all parties antecedent to the special indorser. Lord Kenyon ruled to this effect in Smith *v.* Clarke,[1] and his view was followed by the courts,[2] and was repeated in the text-books, in a form much resembling the language of the section under discussion.[3] But Lord Kenyon failed to see that the special indorsement was notice that the instrument had become the property of the special indorsee, and that the right of any subsequent taker must be derived through him. To correct Lord Kenyon's error, and, as Mr. Chalmers tells us,[4] "to bring the law into accordance with mercantile understanding," section 8–3 was inserted in the English act, which defined an instrument payable to bearer as one "which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." This section of the English act is reproduced in section 9–5 of the American act, so as to change the law in this country also. Then, in apparent forgetfulness of the effect of section 9–5, the framers of the American act insert section 40, which changes the law back to its former state. One of these repugnant sections, and preferably section 40, should be cancelled.[5]

SECTION 49 gives to the transferee of an instrument payable to the order of the transferer, but not indorsed by the latter, "such title as the transferer had therein," and also "the right to have the indorsement of the transferer." If an indorsement was intended, but omitted through inadvertence, it is obviously just that the transferer should be required to indorse subsequently. If, on the other hand, the omission is not due to inadvertence, it is as obviously unjust, as Mr. Bigelow has pointed out,[6] to compel the transferer to assume the liabilility of an indorser. In section 44 it is provided that any person under obligation to indorse in a

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[1] Peake, 225; 1 Esp. 180, s. c.

[2] Walker *v.* MacDonald, 2 Ex. 527; Savannah Bank *v.* Haskins, 101 Mass. 370; Houry *v.* Eppinger, 34 Mich. 29; Watervliet Bank *v.* White, 1 Den. 608; French *v.* Barney, 1 Ired. 219; Mitchell *v.* Fuller, 15 Pa. 268.

[3] Byles, Bills (13th ed. 1879), 152; Chitty, Bills (11th ed. 1878), 173; Chalmers, Dig. of Bills of Exch. (1878) 96.

[4] Chalmers, Bills of Exch. (5th ed.) 24. See, also, Byles, Bills (16th ed. 1899).

[5] The neutralizing effect of section 40 upon section 9–5 is recognized by the learned writer in 17 Banking Law Journal, 775, who adds: "More wrong than right, it seems to us, will follow the operation of the law as it now stands."

[6] Bigelow, Bills and Notes (2d ed.), 295, n. 1.

representative capacity may indorse in such terms as to negative personal liability. But there is no similar provision for a qualified indorsement in section 49. Such a provision should be added to this section.[1]

There is a further objection to this section. If the transferee by delivery merely of an instrument payable to the order of the transferer always acquires only the rights of the latter, such a transferee of a note made for the accommodation of the payee could not enforce it against the maker, even though he might have given to the payee the money which it was the object of the maker to procure for the payee on the credit of his own name. Such a result would be a reproach to the law, even if due to the action of the courts. But this section, so far from codifying, actually nullifies the judicial precedents in this country.[2] This defect in this section would be cured by inserting after the word "addition" the words, "the right to enforce the instrument against one who signed for the accommodation of his transferer and."

SECTION 64, defining the liability of the anomalous indorser, is an excellent piece of codification but for one slip. One not otherwise a party to a bill payable to the order of the drawer may sign it for the accommodation of the acceptor, as in Matthews *v.* Bloxsome.[3] He should clearly be liable to the drawer-payee. But by the subsection 2 he is liable only to parties subsequent to the drawer. This case may be provided for by making the first two sections read as follows: —

(1) "If the instrument is a note or bill payable to the order of a third person, or an accepted bill payable to the order of the drawer, he is liable to the payee and to all subsequent parties."

(2) "If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or payable to bearer, he is liable to all parties subsequent to the maker or drawer."

SECTION 65 introduces the distinction that the implied warranty of genuineness, title, and the like of the transferer by delivery inures to the benefit of his immediate transferee, whereas the sim-

[1] The Colorado legislature, to remedy this injustice, before enacting this section, added to the sentence requiring an indorsement the words, "if omitted by accident or mistake."

[2] Hughes *v.* Nelson, 29 N. J. Eq. 547; Matthias *v.* Kirsch, 87 Me. 523; Meggett *v.* Baum, 57 Miss. 22; Freund *v.* Importers' Bank, 76 N. Y. 352. See, further, the Scotch case of Hood *v.* Stuart (Court of Sess., March 20, 1870) and the analogous case of an accommodation bond, Dickson *v.* Swansea, L. R. 4 Q. B. 44, which greatly lessens the authority of Edge *v.* Bumford, 31 L. J. Ch. 805.

[3] 33 L. J. Q. B. Young *v.* Glover, 3 Jur. N. S. 637, is a similar case.

ilar warranty of the indorser without recourse runs in favor of all subsequent holders. This idea that the indorser without recourse is liable to any one but his transferee is an original invention of the Negotiable Instruments Law. But this is its only merit. To say that such an indorser is liable in any manner on the bill is to contradict the plain language of his indorsement. His liability is extrinsic to the bill. As the vendor of the bill, he, like the vendor of other personal property, is liable to his vendee, but to no subsequent purchaser, for the genuineness and title of the thing sold. His liability is therefore identical with that of the transferer by delivery. This view is brought out in almost all of the sixteen reported cases seen by the writer, in which an indorser without recourse was made a defendant. There seems to be no trace of authority for an action against such an indorser by any one but his immediate transferee. In one case[1] a subsequent holder attempted to charge the indorser without recourse, but the court decided against him, Mr. Justice Dillon delivering a convincing opinion, in which the indorsement without recourse was treated as creating the same liability as a transfer by delivery. Section 65 should be amended by adding in the first sentence after "warrants" the words, "as a vendor, and, therefore, only to the vendee," and by cancelling the sentence beginning with the words, "But, when the negotiation."

SECTION 66 betrays the same misconception in regard to warranty as the preceding section. One who indorses without qualification is liable as indorser to all subsequent holders. If he transfers the bill for value, he incurs the additional but extrinsic liability of a vendor. But this liability runs only to his indorsee as a vendee. These liabilities are quite distinct. As indorser, he cannot be charged until the maturity of the bill and after due diligence exercised by the holder. As warrantor, since the warranty is broken at the moment of transfer, if at all, he may be sued at once, before maturity, and without regard to presentment or notice.[2] An accommodation indorser is obviously not a vendor. The party accommodated fills that position. The accommodation indorser is, therefore, not liable as a warrantor, but is chargeable only as

[1] Watson *v.* Chesire, 18 Iowa, 202. In Challis *v.* McCrum, 22 Kan. 156, Mr. Justice Brewer said: "Of course no action will lie on the indorsement, for by his written contract Challis expressly declines to assume the liability of an indorser. If sustainable at all, it must be against him as a vendor, and not as an indorser, and upon the doctrine of implied warranty."

[2] Turnbull *v.* Bowyer, 40 N. Y. 456; Warren-Scharf Co. *v.* Com. Bank, 97 Fed. R. 181; Copp v. McDougall, 9 Mass. 1; Blethen *v.* Lovering, 58 Me. 437 (*semble*).

indorser upon the bill after maturity and due notice of dishonor.[1] Section 66, making an accommodation indorser liable as a warrantor, ignores an important distinction, nullifies sound decisions, and does injustice to the accommodation indorser by imposing upon him a liability which he never intended to assume, and which cannot be justified on any legal principle. Section 66 should be amended by omitting everything after "qualification" in the first line to the word "engages" in the first line of the last paragraph.

There is a further criticism to be made upon sections 65 and 66. The transferer by delivery or by a qualified indorsement not only warrants, in section 65–1, 2, and 3, the genuineness of the instrument, his title to it, and the capacity of prior parties, but also, by 65–4, 'that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." Why should the knowledge of the transferer be irrelevant in the case of forgery, or capacity of prior parties, and yet be essential when the instrument is invalid because of usury or other statutory real defence, or, if the transfer is after maturity, by reason of payment, failure of consideration, or other personal defence? This sub-section codifies the New York case of Littauer *v.* Goldman,[2] which is at variance with general judicial opinion,[3] and has been spoken of by the court of a sister state as "admittedly supported by no precedent."[4] This sub-section would be consistent with the preceding sub-sections, if it read as follows: "That the instrument is subject to no real defence nor, if the transfer is after maturity, or after dishonor noted on the bill, to any personal defence." Furthermore, whatever be the final form of this sub-section, there seems to be no reason why it should not be incorporated, by reference, in section 66–1, if the latter sub-section is to be retained in any form.

SECTION 68 declares that "joint payees or joint indorsees who indorse are deemed to indorse jointly and severally." Joint makers, joint drawers, and joint acceptors are liable only jointly.

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[1] Central Bank *v.* Davis, 19 Pick. 373; Susquehanna Bank *v.* Loomis, 85 N. Y. 207 (distinguishing Turnbull *v.* Bowyer, *supra*); Case *v.* Bradburn, 1 Daly, 256. The same distinction between an accommodation indorsement and an indorsement for value is illustrated by Leach *v.* Hewitt, 4 Taunt. 731, and Cundy *v.* Marriott, 1 B. & Ad. 196.

[2] 72 N. Y. 506.

[3] Giffert *v.* West, 33 Wis. 617; Daskam *v.* Ullman, 74 Wis. 474; Hannum *v.* Richardson, 48 Vt. 508; Knight *v.* Lanfear, 7 Rob. (La.) 172.

[4] Wood *v.* Sheldon, 42 N. J. 421, 424. See a similar criticism in Meyer *v.* Richards, 163 U. S. 385, 411, 412.

Why this arbitrary discrimination? It would seem to be a blunder, that should be corrected by cancelling the last sentence of this section.

SECTION 70. "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument." This changes or would change the law, and for the worse, as to certificates of deposit, in Georgia, Indiana, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota, and Vermont.[1] Furthermore, presentment would not be necessary in the case of bank-notes circulating as money. The section should be amended by adding in the first line after "necessary" the words, "except in the case of bank-notes and certificates of deposit."

SECTION 119–4. "A negotiable instrument is discharged by any other act which will discharge a simple contract for the payment of money." If a creditor accepts a horse in satisfaction of his claim, not yet matured, the simple contract claim is discharged. But if a holder accepts a horse from the maker before maturity, in satisfaction of the note, the note is not discharged. The accord and satisfaction gives the maker merely a personal defence, which is cut off the moment the note is transferred to a holder in due course. This sub-section should be cancelled. It would be superfluous, even if it were accurate.

SECTION 120–3. "A person secondarily liable on the instrument is discharged by the discharge of a prior party." This sub-section is the most mischievously revolutionary provision in the new code. It means that if the maker is discharged by the statute of limitations, all the indorsers are *ipso facto* discharged. It means that, if a joint note is executed by "A, principal," and "B, surety," and B dies, whereby the whole burden survives to A, all the indorsers are discharged. It means that if by some inadvertence due notice should not be given to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged. It would mean, but for the saving grace of section 16 of the National Bankrupt Law, that an indorser would be discharged if any prior party received his discharge in bankruptcy. The bankrupt law was not in force when the new code was recommended by the commissioners, nor when it was adopted by some of the states, and it may be repealed at any time. It is almost needless to say that there is nothing corresponding to this provision in the English act. It was doubtless developed

[1] In California, Iowa, Michigan, Minnesota, and Wisconsin certificates of deposit need not be presented to charge the bank.

by the draftsman from the peculiar New York case of Shutts *v.* Fingar.[1] The New York court had introduced in Merritt *v.* Todd[2] the novel doctrine that, to charge the indorser of a demand note in that state, it was not necessary, as it is in other jurisdictions, to present the note for payment within a reasonable time. Merritt *v.* Todd was followed, with reluctance, in subsequent cases. In Shutts *v.* Fingar the holder failed to present a similar note to the maker until after the latter was discharged by the statute of limitations, but claimed the right, under the authority of Merritt *v.* Todd, to charge the indorser by a presentment at any time. The court, however, declined to follow that case to its logical conclusion. While adhering to the doctrine that a presentment of a demand note need not be made within a reasonable time, they decided that such a note must be presented before the maker was discharged by the statute of limitations. This, it will be seen, is a totally different proposition from that of sub-section 3. Since Merritt *v.* Todd has become obsolete through the adoption in New York of section 71 of the Negotiable Instruments Law, Shutts *v.* Fingar is now nothing more than a legal curiosity. This sub-section should be stricken from the new code.

SECTION 120–5 and 6 declare that a release of the principal debtor or a binding agreement to give him time will discharge a party secondarily liable, unless the holder expressly reserves his rights against such party. There seems to be no sufficient reason, on the one hand, for inserting these doctrines of suretyship in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance. But the question of superfluousness apart, these sub-sections are inaccurate in point of law. If the party primarily liable is an accommodation acceptor or maker, a release of him by the holder, or a binding agreement to give him time, does not discharge the accommodated drawer or indorser. The discharge of the drawer or indorser in such cases would be highly inequitable. The action of the holder cannot possibly prejudice them, for, under no circumstances, would they, on paying the holder, have any right either by subrogation or indemnity against the accommodation acceptor or maker. The authorities are unanimous against the discharge of the party accommodated, although he is only secon-

[1] 100 N. Y. 539. A paragraph from the opinion of Ruger, C. J. (p. 545), forms the staple of Mr. Crawford's note to this section. Crawf. An. N. I. L. 84, n. (a). See, also, Crawf. An. N. I. L. 84, n. (c).

[2] 23 N. Y. 28.

darily liable on the instrument.[1] These sub-sections are not in the English act, and should either be eliminated from the American act or amended. Furthermore, if it is thought best to retain them in an amended form, another sub-section should be added, to the effect that an accommodation acceptor or maker, although the party primarily liable on the instrument, will be discharged, if the holder, with knowledge of the accommodation, releases, or by a valid agreement undertakes to give time to the accommodated drawer or indorser. The authorities are almost unanimous on this point also,[2] although in a few jurisdictions the accommodation party must resort to equity for his relief. In the judgment of the writer, the wise course is to drop sub-sections 5 and 6 from the act.

SECTION 175 subrogates the payor for honor "to the rights of the holder as regards the party for whose honor he pays and all persons liable to the latter." This section is identical with section 68–5 of the English act. Since an accommodation acceptor is not liable to the drawer, one who pays for the honor of the drawer cannot charge such an acceptor. Lord Erskine so ruled in *Ex parte* Lambert,[3] disapproving of Lord Loughborough's decision to the contrary in *Ex parte* Wackerbath.[4] But in *Ex parte* Swan,[5] Malins, V. C., condemned with some emphasis the doctrine of Lord Erskine, and *Ex parte* Lambert has since been regarded as an overruled case.[6] In the face of this the English Bills of Exchange Act and the American Negotiable Instruments Law have codified the overruled opinion of Lord Erskine. Mr. Chalmers in his excellent treatise is careful to indicate every instance

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[1] Collott *v.* Haigh, 3 Camp. 281; Hill *v.* Read, 6 D. & Ry. N. P. 26; Sargent *v.* Appleton, 6 Mass. 85; Parks *v.* Ingram, 22 N. H. 283. The following cases turn on the same principle: Ludwig *v.* Iglehart, 43 Md. 39; Gloucester Bank *v.* Worcester, 10 Pick. 528; Bruen *v.* Marquand, 17 Johns. 58.

[2] Ewin *v.* Lancaster, 6 B. & S. 571; *In re* Goodwin, 5 Dill. 140; Hall *v.* Capital Bank, 71 Ga. 715; Lacy *v.* Lofton, 26 Ind. 324; Adle *v.* Metoyer, 1 La. An. 254; Guild *v.* Butler, 127 Mass. 386; Canadian Bank *v.* Coumbe, 47 Mich. 358; Meggatt *v.* Baum, 57 Miss. 22; Westervelt *v.* Frech, 33 N. J. Eq. 451; T. N. Bank *v.* Hastings, 134 N. Y. 501 (*semble*); State Bank *v.* Smith, 85 Hun, 200 (*semble*); Shelton *v.* Hurd, 7 R. I. 403. The opposite rule obtains in Pennsylvania and perhaps in Alabama. Stevens *v.* Monongahela Bank, 88 Pa. 157; Wilson *v.* Isbell, 45 Ala. 142. But even these states lend no support to the discharge of the accommodated drawer or indorser by a release or time given to the accommodation acceptor or maker.

[3] 13 Ves. 179. [4] 5 Ves. 574. [5] L. R. 6 Eq. 344–365.

[6] Byles, Bills (10th ed. 1874), 266, 277, and in later editions. Chitty, Bills (11th ed. 1878), 352. "The case of *Ex parte* Lambert is no longer law." 4 Am. and Eng. Ency. of Law (2d ed.), 499.

in which the English act modifies the previous law. But he gives no intimation that section 68–5 introduces any change. One must infer that he was unconscious of any change. This inference is confirmed by the first edition of his Digest,[1] published four years before the passage of the English act, in which he defines the right of the payor of honor in substantially the same language as that of the act. Mr. Chalmers's statement of the result of the decisions is in general so accurate that one wonders at this slip, which is all the more surprising, because in his Table of Cases Overruled he includes *Ex parte* Lambert as overruled by *Ex parte* Swan. Section 175 should be amended by substituting for "liable," the fourth word from the end, the word "prior." This amendment would make the section accord with the Continental Law,[2] with the California Code,[3] and with mercantile understanding.

SECTION 186 provides that the failure to present a check for payment within a reasonable time will discharge the drawer "to the extent of loss caused by the delay," but makes no provision for the effect of not giving due notice of dishonor when the check has been presented but not paid. Such a case must therefore be governed by section 89, with the result that the drawer is absolutely discharged, although the laches in giving notice has not caused any loss to him. This is obviously an undesirable rule, and is an innovation of the English and American codification. The courts and the text-writers give the same effect to delay in presentment and delay in sending notice of dishonor.[4]

It remains to mention briefly the omissions in the Negotiable Instruments Law. The English act deals with the effect of the loss or destruction of a bill or note,[5] defines the liability of the acceptor to the drawer,[6] and the liability of parties in default for interest, damages, and reëxchange,[7] and contains several provisions relating to the difficult subject of Conflict of Laws.[8] There is

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[1] Page 192.

[2] French Code de Commerce, Art. 159, translated in 3 Rand. Comm. Paper (2d ed.), 2836; German Wechselordnung, sect. 63, translated in 3 Rand. Comm. Paper (2d ed.), 2800.

[3] Sect. 3205, 3 Rand. Comm. Paper (2d ed.), 2727.

[4] Clark *v.* Nat. Bank, 2 MacArthur, 249; Griffin *v.* Kemp, 46 Ind. 172; Gregg *v.* George, 16 Kan. 546; Stewart *v.* Smith, 17 Ohio St. 82; Purcell *v.* Allemong, 22 Grat. 739; *In re* Brown, 2 Story, 502; Story, Prom. Notes, § 493; Dan. Neg. Inst. (4th ed.) § 1587; 2 Benj. Chal. (2d ed.) 270.

[5] Sects. 69, 70.

[6] Sects. 57 (1), 59 (2 a).

[7] Sect. 57 (1), (2), and (3).

[8] Sect. 72 (1), (2), and (3).

nothing in the American act on any of these topics. Neither act mentions the duty of the drawee of a check to honor it, if in funds, nor the effect of the failure of the last indorser to receive or to transmit notices of dishonor, duly mailed with the notice to himself, to be forwarded to prior indorsers.[1] These omissions, although marring the symmetry of the new code, cannot be urged as fatal objections to its general adoption.

But if the preceding criticisms are well founded, the errors and imperfections of the Negotiable Instruments Law are so numerous and so serious that, notwithstanding its many merits, its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility.

Uniformity of amendment would be secured, and the passage by all the states of a judicious code of Bills and Notes would be accelerated, if the commissioners would reconsider the present Negotiable Instruments Law and submit it, in a revised form, with their approval, and if also they would suggest the form of supplementary legislation requisite to secure the necessary amendments in the states which have already passed the Negotiable Instruments Law. If this action on the part of the commissioners is found to be impracticable, it is hoped that the amendments proposed in this paper may commend themselves to the state legislatures. Fortunately the correction of many of the errors requires only the use of scissors.

In pointing out the defects in the new code the writer must not be understood as criticising either the zeal or the skill of the commissioners. They made a mistake, it is believed, but not an unnatural one, in view of the novelty of the work, in not securing an abundance of competent criticism, both public and private, from widely different sources, before issuing with their sanction the final draft of the proposed law. To the lack of adequate criticism must be ascribed the shortcomings of the Negotiable Instruments Law.

James Barr Ames.

[1] Such failure discharges the prior indorsers according to Aldine Co. *v.* Warner, 96 Ga. 370; Van Brunt *v.* Vaughan, 47 Iowa, 145 (*semble*); Stix *v.* Matthews, 63 Mo. 371, 375. But Wamesit Bank *v.* Buttrick, 11 Gray, 387, is *contra*.